San Jose Mercury News said in an editorial, "[i]n the 21st century, California prospers more by turning water into microchips than by turning it into carrots." Whether one agrees with this statement or not, it is exactly that sentiment that makes farmers and the areas that depend on them, like the Imperial Valley, shiver.

Judge Invalidates EIS for Trinity River

U.S. District Court Judge Oliver Wanger has issued an opinion agreeing with the Westlands Water District that the Department of the Interior failed to adequately discuss the impacts on farmers and species in an Environmental Impact Statement (EIS) that it prepared to support a planned restoration of flow to the Trinity River. Judge Wanger's decision is no surprise, because he ruled in March of last year that Westlands was "likely to prevail" in its argument that the EIS was invalid (CEI May 16, 2001). At that time he issued a preliminary injunction prohibiting DOI from implementing a December 2000 plan to restore the Trinity to about 70% of its historic level by restoring water that has been diverted from the Trinity to the federal Central Valley Project. Westlands relies on CVP water for its supply.

Judge Wanger's decision means that DOI will now release water about equal to the one-third of the Trinity's historic flow. Although this gives the CVP less water than the 90% diversion it has benefited from in the past, it still represents considerably less water than DOI had concluded was necessary to restore Trinity fisheries.

Wanger's 143 page opinion concluded that the EIS had failed to adequately describe the impact of DOI's restoration of water on both farmers using CVP water and on listed species in the Delta. Wanger gave the federal agency four months to revise the EIS consistent with his decision. Environmental groups and Native American tribes that rely on Trinity Water fear that with DOI now under Bush appointee Gale Norton, any new EIS will end up supporting the farmers.

Westlands Water District v. U.S. Department of the Interior, #CIV F 00-7124 OWW DLB (E.D. Cal.).

Westlands to Be Paid for Taking Land Out of Production

The Department of the Interior has agreed to pay the Westlands Water District $107 million to settle a lawsuit over DOI's failure to construct the San Luis Drain. Westlands will pay that money and an additional $32 million to farmers within the District, who will then transfer 33,000 acres of land to Westlands. The District will retire the land thereby presumably taking out-of-production land that was allegedly poisoned by the failure of DOI to construct the drain.

The settlement ends lengthy litigation that led to a Ninth Circuit Court of Appeal decision holding that the Bureau of Reclamation was obligated to complete the drain under 1960 legislation creating the San Luis Unit of the Central Valley Project (CEI February 15, 2000). The drain was originally supposed to carry irrigation water from District properties north where it would be dumped into the San Joaquin River. Due to environmental concerns, the drain was only partially completed. That partial drain emptied the water into Kesterson Reservoir, where it ended up poisoning thousands of water fowl. Reclamation closed the partial drain, which the Westlands farmers claimed resulted in gradually poisoning their land through the buildup of selenium and other contaminants from the now retained irrigation water.

The settlement not only provides the $107 million to Westlands, but allows the District to retain its rights to the CVP water in question. It can presumably sell this water for even more money. Although some environmental groups complain that this result is unfair, DOI points out that it was facing a possible $400 million in liability during the trial of the case.

Supreme Court Deadlock Upholds Ninth Circuit Ruling in Wetlands Case

The U.S. Supreme Court has reached a decision (or non-decision) in the controversial case involving prominent developer Angelo Tsakopoulos. The Court issued a short "per curiam" opinion noting only that "the judgment is affirmed by an equally divided court." The outcome had been predicted by many legal commentators when Justice Anthony Kennedy recused himself from participating in the case due to perceived conflicts. Although the court did not announce which justices were on either side of the case, the assumption is that the court followed the usual liberal/conservative split with the conservatives lining up behind Tsakopoulos. Kennedy was in the majority in the 5-4 decision in the SWANCC decision that limited the federal government's jurisdiction under the Act over isolated wetlands (CEI July 15, 2002).

Tsakopoulos was cited under the Clean Water Act for using the technique known as "deep ripping" to develop his Borden Ranch property into vineyards. EPA cited him for disposing of the plowed soil into what EPA considered seasonal wetlands on the property without a permit under section 404 of the Act from the Army Corps of Engineers. Tsakopoulos challenged the citation and lost at both the District Court and Ninth Circuit levels (CEI August 31, 2001). He claimed that this actions were not covered by the Clean Water Act, because all he was doing was replacing dirt that was dislodged by the ripping process. Alternatively, he argued that his deep ripping fell under an exemption in the Act for "normal farming operations."

Borden Ranch Partnership et al. v. U.S. Army Corps of Engineers, et al., #01-1243 (December 16, 2002).

OEHHA Releases Revised PHG for Perchlorate Amid Growing Controversy

The Office of Environmental Health Hazard Assessment has revised its proposed Public Health Goal for PHG making it more stringent than a proposal released earlier this year. OEHHA's action comes amidst growing concerns in Southern California and the Sacramento area over the impact on drinking water supplies of

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Perchlorate

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leaks of the former rocket propellant. Should OEHHA finalize its PHG at its proposed level of 2-6 ppb, it would establish a groundwater cleanup standard that could lead to highly expensive cleanups paid for by defense contractors and the federal government.

Under California's safe drinking water law, PHGs are established by OEHHA based on the potential of a particular chemical to cause adverse health effects on humans through the consumption of drinking water. In establishing a PHG, OEHHA looks only at the possible health impacts, and does not consider economic or technical feasibility. Once a PHG has been established by OEHHA, it is reviewed by the Department of Health Services which must establish a drinking water Maximum Contaminant Level (MCL) based as closely as is technically and economically feasible on the PHG. Drinking water suppliers must then ensure that their supplies meet the MCL. Although the PHG itself is not binding on suppliers (although they must inform consumers about it), it can and is used by regional water boards and other agencies in establishing groundwater cleanup levels.

Perchlorate was used widely by defense contractors throughout the country as a rocket propellant until quite recently, despite mounting evidence that it causes thyroid problems. It was routinely dumped into unlined pits on the theory that it was relatively safe. High levels of the chemical have been found in groundwater supplies in the Rancho Cordova area, where Aerojet had its major facility, as well as in Southern California where it was used by several defense contractors. Neither the state nor U.S. EPA has established a drinking water standard for perchlorate. In January, EPA released a draft risk assessment containing a 1 part-per-billion (ppb) "drinking water equivalent level" (DWEL) for perchlorate.

In March, OEHHA issued a draft PHG of 6 ppb for perchlorate. Meanwhile, Governor Davis signed legislation this year (SB 1822-Sher) that requires OEHHA to complete its PHG by January 1, 2003 and requires DHS to complete a MCL based on that PHG by January 1, 2004.

The latest OEHHA draft proposal takes the unusual step of proposing a PHG in a range of from 2 to 6 ppp. The agency bases this level on a human study completed this year using oral doses of perchlorate administered to groups of male and female volunteers. This latest study provides important human epidemiological data. EPA in preparing its DWEL relied largely on animal testing.

OEHHA is seeking public comment on this latest draft by January 24. Obviously, this will mean that the agency will not have the PHG completed by the date mandated by SB 1822. The timeline is further compromised by a recent court order obtained by Lockheed from a Los Angeles Superior Court judge requiring OEHHA to do a new peer review on its methodology. The peer review will be performed on this latest draft.

The OEHHA draft PHG can be found on the agency's website at: www.oehha.ca.gov. For further information contact OEHHA at (510) 704-9700.

Senators Seek Help from EPA and Defense Department

Meanwhile, California Senators Dianne Feinstein and Barbara Boxer have sent separate letters to U.S. EPA Administrator Christine Whitman and Defense Department Secretary Donald Rumsfeld seeking their assistance in dealing with perchlorate's threat to California drinking water supplies. A letter to Whitman by Boxer seeks her "quick action" to deal with spreading contamination in San Bernardino County that has now closed eight drinking water wells in the Rialto/Colton area. Spread of perchlorate contaminant plumes in that area has been exacerbated by the ongoing drought. Senator Feinstein's letter to Secretary Rumsfeld states that the Department of Defense "bears a special responsibility to help remedy the situation" and seeks clean-up funding through the Formerly Used Defense Facilities (FUNDs) program.

The military and defense contractors so far do not agree with either EPA or the state about the danger of trace levels of perchlorate. A lengthy and informative article in the December 16, 2002 Wall Street Journal lays out a long history of disagreements between the defense establishment and federal and state environmental officials. According to the Journal, DOD and its military contractors claim that perchlorate levels in drinking water below 200 ppb are safe.

State Board Leaves Waivers to Regions

The state's nine regional boards have historically exempted certain categories of waste dischargers from permit requirements pursuant to categorical "waivers" authorized under the state's water quality law (Porter-Cologne Act). In theory these discharges were exempted because they have de-minimis impacts on water quality, and were too numerous to deal with by either individual or general permits. In 1999 the Legislature, responding to environmentalist complaints that some of these discharges cumulatively caused enormous problems (e.g. agricultural discharges), passed SB 390 (Alpert). That legislation effectively terminates all waivers as of January 1 of this year, unless a regional board renews the waiver at a public hearing after determining that its continuance is in the public interest. The response by the regions has been to adopt resolutions either: (1) renewing categories of waivers subject to specified conditions; (2) eliminating the waivers thereby requiring each individual source within that category to obtain an individual permit; or (3) adopting general waste discharge requirements (permits) that will be applicable to all dischargers within a particular category.

The State Board's Response

While many of the waivers are relatively uncontroversial, several of them sparked considerable interest thereby drawing the attention of the State